QUESTIONS PRESENTED

I. Whether the offer of judgment failed to comply with the requirements of Rule 68?

II. Whether the District Court and the Court of Appeals abused their discretion in denying Delta's motion for costs?

III. Whether the Court of Appeals erred in examining and balancing the policies of Title VII of the Civil Rights Act of 1964 and Rule 68 of the Federal Rules of Civil Procedure?

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MISCELLANEOUS

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES, INC.,

Petitioner,

vs.

ROSEMARY AUGUST,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Jt. App. pp. 2-7)[1] is reported at 600 F.2d 699. The decision of the District Court (Jt. App. pp. 8-14) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1979. On August 28, 1979 Delta's timely petition for rehearing and suggestion for rehearing en banc was denied. (Jt. App. p. 1). Delta's petition for a writ of certiorari was filed within ninety days thereafter and was granted on April 21, 1980.

STATUTES AND RULES INVOLVED

The relevant statutes and rules are Title VII of the Civil Rights Act of 1964, 42 U.S.C.§2000e, et seq. and Rule 68 of the Federal Rules of Civil Procedure.

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[1] Jt. App. refers to the Joint Appendix filed with the Court by Delta Air Lines, Inc. and Rosemary august as provided in Rule 30 of the Rules of the Court.

STATEMENT OF THE CASE

Amicus curiae, the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), concurs with petitioner's statement of the case as to the sequence of events. It does not concur in petitioner's description of the decisions of the District Court and the Court of Appeals below. The District Court, in denying petitioner's motion for costs pursuant to Rule 68 of the Federal Rules of Civil Procedure ("Rule 68") decided that in order for an offer of judgment to trigger the provisions of Rule 68, the offer must be "at least arguably reasonable" and a good faith attempt to settle the parties' litigation. (Jt. App. p. 11) The District Court considered the time at which the offer was made, approximately four months after the institution of the suit, the amount of the offer, $450 to include all costs and attorneys' fees incurred to the date of the offer, the decision of the Equal Employment Opportunity

Commission which encouraged August to bring suit, and the relief sought by the respondent. The District Court concluded that the offer of $450 could only have been effective if respondent's claim were totally lacking in merit, a situation which was not before it in this case. (Jt. App. p. 12) The offer, therefore, was not an effective offer under all the circumstances, compelling the application of Rule 68.

The Court of Appeals for the Seventh Circuit, affirming the District Court, relied on the significant national policies embodied in Title VII, 42 U.S.C. §§2000e, et seq. It rejected a technical interpretation of Rule 68,a procedural rule, which would have the effect of chilling the pursuit of those overriding objectives. (Jt. App. p. 6) The Court of Appeals ruled that, at least in Title VII cases, the trial judge may exercise threshold discretion in ruling on a motion for costs pursuant to Rule 68 and may consider factors such as the time the offer

was made, the final outcome of the case, and the good faith and reasonable relationship of the offer to the issues, litigation risks, and expenses involved in the case. The Court also warned that a literal reading of Rule 68 would encourage bad faith offers by defendants, and thereby denigrate Rule 68 itself and its policy of encouraging settlements. (Jt. App. p. 5)

SUMMARY OF ARGUMENT

The respondent's offer of judgment in the instant case failed to comply with the requirements of Rule 68 of the Federal Rules of Civil Procedure in that it did not encompass the relief prayed for by respondent, nor did it include an adequate amount for attorneys' fees, a part of costs in employment discrimination cases. Neither the District Court nor the Court of Appeals erred in denying respondent's motion for costs, particularly in view of the significant national policies underlying Title VII. Further, by reviewing the policies underlying both provisions, the Court of Appeals promoted the policies of the Federal Rules of Civil Procedure and Rule 68.

ARGUMENT

I. The Offer of Judgment Failed to Comply with the Requirements of Rule 68

In order to trigger the cost-shifting provisions of Rule 68, an offer of judgment must reasonably encompass the relief prayed for. Moore's Federal Practice §6804 (2d ed. 1975); Wright & Miller, Federal Practice & Procedure, §3001 (1973). The need for careful analysis of an offer of judgment in a Title VII case is particularly compelling when the nature of the relief sought is considered.

One element of relief in a Title VII suit is equitable relief to remedy past discrimination and to prohibit future discrimination. The goal of this relief is to make a victim of discrimination "whole," as expressed by this Court in Albermarle Paper Company v. Moody, 422 U.S. 405 (1975):

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects

> of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154, 422 U.S. at 418.

In addition, Title VII authorizes awards of back pay, reinstatement, and costs, which include attorneys' fees. 42 U.S.C. §2000e-5(k).

Petitioner Delta's offer of judgment was not in an amount adequate to cover costs, including attorneys' fees, to the date of the offer. It failed to offer any equitable relief It expressly disclaimed liability, offered no back pay, and did not offer reinstatement. Thus, Delta's offer was not an "offer of judgment" within the meaning of Rule 68.

Although there are but a few cases which deal with offers of judgment under Rule 68, two recent cases are helpful regarding sufficiency of the relief offered, Mr. Hangar, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974), and Scheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978). In Mr. Hangar, Inc., supra, the most oft-cited case dealing with Rule 68, the plaintiff sought both legal

infringement of its hanger design. The defendants made an offer of judgment of $25 in damages, an acknowledgement of the plaintiff's rights, an admission of the infringment, and a promise to cease its infringing practices. The offer was rejected, and the trial resulted in a judgment for defendant. Following defendant's motion for costs from the date of the offer, the district court reviewed the terms of the offer, holding:

> If costs are to be imposed pursuant to the provisions of Rule 68 a preliminary finding is required that an appropriate offer of judgment has been made in compliance with that rule. 63 F.R.D. at 610.

The court found that the defendants' offer of judgment was reasonable because, while it only offered $25 in damages, it acknowledged the plaintiff's rights, admitted the infringement, and promised to cease the infringing practices. 63 F.R.D. at 610. The offer afforded plaintiff substantially all the relief prayed for in the complaint, and thus, complied

with Rule 68.

In Scheriff v. Beck, supra, the district court examined an offer of judgment in a civil rights action under 42 U.S.C. §1983. The plaintiff rejected the defendants' offer of judgment of $2,200, with costs but not including attorneys' fees, but recovered only $500 following the trial. The district court reviewed the offer, and found it insufficient because the offer failed to include attorneys' fees. "Rule 68 does not permit an offeror to choose which accrued costs he is willing to pay." 452 F. Supp. at 1260.

The Scheriff court was correct. The relief offered must include all costs then incurred by the plaintiff. Wright & Miller, Federal Practice & Procedure, §3002, Moore's Federal Practice, §68.04, United States v. Mortenson, 11 F.R.D. 516, 517 (D. Neb. 1951). In civil rights actions, attorneys' fees are a recognized part of costs. §706(k) of Title VII, 42 U.S.C. §2003-5(k) and the Civil Rights Attorneys' Fees Award Act of 1976 42 U.S.C.

§1988, as well as some ninety federal attorneys' fees statutes, direct that attorneys' fees be assessed as costs.[1]

In the instant case, the purported offer of judgment made by Delta did not fulfill the requirements of Rule 68. The failure of Delta to include in its offer of judgment any equitable relief, backpay or reinstatement, any colorably reasonable amount for costs, including attorneys' fees, and its failure to admit liability caused the offer to fail as a proper Rule 68 offer of judgment. Thus, the rulings of both the District Court and the Court of Appeals should be upheld.

II. Neither the District Court Nor the Court of Appeals Erred in Denying Delta Recovery of Litigation Costs

It has been generally recognized that the

[1] See e.g. Freedom of Information Act, 5 U.S.C. §552(a)(4)(E)(1976); Bankruptcy Act, 11 U.S.C. §104(a)(1)(1970); Clayton Act, 15 U.S.C. §15 (1976)

District Court in Title VII action is particulary suited to perform the task of determining the reasonableness of settlement agreements. Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977). While the decision of the Fifth Circuit was directed toward settlement agreements, the principle is no less applicable in cases where the district court is called upon to review the sufficiency of offers of judgment. The District Court herein was in the best position to determine whether any proposed settlement, or offer of judgment, met the "make whole" remedial policies of Title VII litigation. The District Court properly reviewed the contents of the offer, the time at which the offer was made, the merits of respondent August's case, and the remedial policies of Title VII. The District Court concluded that there was evidence supporting August's claim of racial bias, and that August had been encouraged by the findings of the Equal Employment Opportunity Commission. August sought

damages in her complaint, not including attorneys' fees and costs, of $20,000 in backpay, reinstatement, and a prohibition against future discrimination at the time the offer was made. After the litigation was four months old, Delta offered the sum of $450, which amount was to include costs and attorneys' fees to date, an offer which the district court noted would hardly be sufficient to cover costs and attorneys' fees incurred to the date of offer. The district court concluded that respondent August acted reasonably in refusing petitioner's offer. The Court of Appeals upheld these findings.

Petitioner now claims that the offer of judgment was reasonable because that concept "may only be measured in terms of the results, not the expectations of litigation; the result and judgment proved that Delta's offer was more than reasonable." (Pet. Brief, p. 24) This Court has explicitly and unequivocably rejected this unrealistic interpretation of the term "reasonableness."

In discussing whether the institution of a Title VII action was reasonable, this Court stated in Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978):

> [I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because the plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most air-tight claims, but seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one believes that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or facts appear unquestionable or unfavorable at the outset, a party may have entirely reasonable ground for bringing suit. 434 U.S. at 421-422.

The uncertainties surrounding the decision to bring an action apply equally to the decision to accept or reject an offer of judgment. Because an action results in a judgment for defendant, it does not follow that bringing the action was unreasonable. Likewise,

because a plaintiff rejects an offer of judgment and eventually recovers less than the offer, it does not follow that the rejection was unreasonable. The standard of reviewing the reasonableness of an offer of judgment cannot be result oriented. Rather, that standard is a function of the time at which the offer was made and its content, in relation to the merits of the plaintiff's case. Using this standard, including the relief sought by the plaintiff, the District Court concluded that Delta's offer was unreasonable. These findings were examined and upheld by the Court of Appeals and should not be disturbed.

III. Rule 68 Cannot Be Viewed Alone, But Must Be Construed With Title VII of the Civil Rights Act of 1964

A. Principles of Statutory Construction Require Examination of Policies Underlying Conflicting Statutes

The offer of judgment made to August failed to meet the requirements of Rule 68, and there was no abuse of discretion by either court below in examining the terms of the offer to determine its propriety under Rule 68. However, to the extent that the provisions of Title VII and Rule 68 conflict in the instant case, the District Court and the Court of Appeals correctly examined the policies of both statutes and construed them to best effectuate the provisions of both.

In the Brief for petitioner, Delta Air Lines ("Delta"), deals at length with the apparently unquestionable language of Rule 68. Delta's view, however, is somewhat myopic, isolating the rule from interaction with any other statutory provisions. In addition, Delta's approach to Rule 68 is entirely inflexible, a construction which was not intended by the drafters of the Federal

Rules of Civil Procedure.[2]

For example, Delta argues that there is only one meaning for the word "must," that it can only be interpreted as an imperative. Many courts, however, have taken the position that terms which are generally mandatory may sometimes be directory and terms which are generally construed as directory may, in some cases, be mandatory. Wilshire Oil Company of California v. Costello, 345 F.2d 241, 243 (9th Cir. 1965). Indeed, as this Court recognized forty five years ago, language of command provides a significant, though not controlling, test of the mandatory character

[2] Rule 1 of the Federal Rules of Civil Procedure requires the court to construe the rules liberally to promote the ends of justice and facilitate decisions on the merits, rather than determinations on technicalities. Bickman v. Taylor, 329 U.S. 495 (1945), Wright & Miller, Federal Practice & Procedure, §1029 (1969).

of a statutory provision. Escoe v. Zerbst, 295 U.S. 490, 493 (1935). The interpretation of mandatory and directory terms depends also upon the background circumstances, the context in which the words are used, and the intention of the legislature. United States v. Reed, 411 F.2d 381, 383 (9th Cir. 1970). Particularly, where two statutes conflict, as here, the court should examine the purposes of each statute through the extrinsic aids available. Train v. Colorado Public Interest Research Interest Group, 426 U.S. 1, 10 (1976); United States v. American Trucking Association, 310 U.S. 534, 543-544 (1940), as quoted in Myers v. Hollister, 226 F.2d 346, 348 (D.C. Cir. 1955). If that examination reveals a convincing argument to the contrary, terms which are generally considered mandatory may be directory only. Manatee County, Florida v. Train, 583 F.2d 179, 182 (5th Cir. 1978); Sierra v. Train, 557 F.2d 485, 489 (5th Cir. 1977); C. Sands,

Sutherlands Statutory Construction, §25.04 (4th ed. 1973).[3]

A convincing argument was made by both the District Court and the Court of Appeals in the instant case that the seemingly mandatory language of Rule 68 must not be applied mechanically. Unthinkingly applying a mandatory rule that a plaintiff should be charged with defendant's costs in the event that the judgment finally secured by plaintiff is less favorable than defendant's offer of judgment, would thwart the policies behind Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., and lead to absurd and harsh results. The Court of Appeals correctly ruled that Rule 68 cannot be allowed to defeat one of the primary purposes of Title VII, that of encouraging victims of discrimination to seek private redress in the courts. Myers v. Hollister, 226 F.2d 346, 348 (D.C. Cir. 1955). Contrary to Delta's argument that the District Court erred in examining the sufficiency of Delta's offer, the District Court took the only action possible in light of the conflict presented.

Faced with two conflicting statutes, the District Court and the Court of Appeals properly looked to the purposes underlying both enactments. Fanning v. United Fruit Company, 355 F.2d 147, 149 (4th Cir. 1966). The Court of Appeals for the Tenth Circuit was faced with a similar problem in United States v. Dunn, 545 F.2d 1281 (10th Cir. 1976), in which the court emphasized:

> The problem is one of construing two statutes, neither enacted in any obvious contemplation of the other, but each bearing upon the other when both are involved in the factual situation presented. In such circumstances, we should seek a solution which avoids violence to the terms of either but which brings both into

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3 In statutes which guide the discharge of a governmental official's duties terms which propose to secure order and dispatch in proceedings are usually construed as directory, whether or not worded in the comparative, especially when in the alternative is harshness or absurdity. French v. Edwards, 80 U.S. (13 Wall.) 506, 511 (1872); Ralpho v. Bell, 569 F.2d 607, 627 (D.C. Cir. 1977) (policy of Micronesian Claims Act to redress damage claims during World War II overrode provisions in statute calling for end to agency's handling of claims.)

> correlation, since to construe either in isolation from the other would thwart the intention of Congress. 545 F.2d at 1282.

B. The Court Below Correctly Examined the Policies of Rule 68 and Title VII

The Civil Rights Act of 1964, including Title VII, is designed to encourage private redress of civil rights violations. Relief which may be sought by victims of discrimination includes injunctive relief against employers to right past wrongs and prohibit future discrimination, reinstatement of jobs, and back pay. In addition, to encourage private enforcement, Congress provided for the award of attorneys' fees and costs to prevailing parties.[4] Congress thus recognized that one of the greatest obstacles to private suits to eliminate discrimination was the cost of litigation and representation by competent counsel.

> When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction he does so not for himself alone but also as a "private attorney general" vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees. . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

The irony of Delta's position in the instant case is that even successful plaintiffs, though they may be entitled to an award of attorneys' fees and costs as prevailing parties against defendants, may also be subject to an award to defendants of costs, including attorneys' fees, where defendants make an offer of judgment which exceeds the eventual judgment recovered by plaintiff. Such a result is untenable. More importantly, Delta's position flies in the face of the express intent of Congress to promote access to the courts in civil rights cases. Congress could not have intended one of the Federal

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4 See, e.g. §706(k) of Title VII, 42 U.S.C. §200e-5(k); Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988.

Rules of Civil Procedure, meant to effectuate swift and fair adjudication of lawsuits, to thwart the intent of an entire body of law designed to promote private actions for redress of civil rights violations.

Under Delta's reading of Rule 68, a nominal offer by a defendant, even if admittedly unreasonable or in bad faith, would submit a plaintiff to the risk of a substantial financial burden. This form of "cheap insurance" cannot be permitted. The case is rare, indeed, that counsel or a party can accurately forecast the precise outcome of litigation. The fear of a mandatory monetary award could unduly pressure a plaintiff to opt for an unreasonable offer of judgment, or worse, to abandon the cause of action altogether and quite apart from the merits of a claim. As this court noted recently, in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1974), because a plaintiff does not ultimately prevail, it does not follow that the action was unreasonable or without some foundation.

> That §706(k) [42 U.S.C. §2000e-5(k)] allows fees awards only to prevailing private plaintiffs should assure this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success. [Footnote omitted.] To take this further step of assessing attorneys' fees against plaintiffs simply because they do not finally prevail will substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorneys' fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiffs continued to litigate after it clearly became so. [Emphasis in original] 434 U.S. at 422.

In Christiansburg Garment Co. v. EEOC, supra, this Court adopted the rationale of the Courts of Appeals for the Fourth and Second Circuits[5] that attorneys' fees should only be awarded to prevailing defendants where the plaintiff's action was found to be unreasonable, frivolous, meritless or

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[5] United States Steel Ct. v. United States, 519 F.2d 359 (4th Cir. 1977); Carrion v. Yeshiva University, 535 F.2d 522 (2d Cir. 1977).

vexatious. In this decision, the Court interpreted the "unambiguous" statutory language of §706(k) of Title VII, 42 U.S.C. §2000e-5(k), authorizing reasonable attorneys' fees to the prevailing party in a Title VII action. The petitioner company in Christiansburg argued that in the absence of any statutory language regarding fees awards to prevailing defendants fees should ordinarily be recoverable by prevailing defendants unless special circumstances would render the award unjust. This Court rejected that mechanical application of §706(k) because it would detract from the express policy underlying Title VII actions. Similarly, this Court, for the same reason, should now reject a mechanical application of Rule 68.

Petitioner's interpretation of Rule 68 would not only wreak havoc with Title VII, but also would destroy any incentive to make a genuine offer of judgment. The purpose of Rule 68 is to encourage settlement, to encourage defendants to offer the amount

plaintiffs "might reasonably be expected to recover." Wright & Miller, Federal Practice & Procedure, §3001 (1969); Perkins v. New Orleans Athletic Club, 429 F. Supp. 661, 666 (E.D. La. 1976) (defendant can shift costs to plaintiff by offering what is really due); Honea v. Crescent Ford Truck Sales, Inc., 394 F. Supp. 201, 202 (E.D. La. 1975) (Rule 68 operates if a reasonable offer is spurned).

Discretion is the keystone to the effective functioning of the federal rules. Oliver v. Kalamazoo Board of Education, 346 F. Supp. 766, 789, n.1, (W.D. Mich. 1972), aff'd per curiam, 448 F.2d 635 (6th Cir. 1972), citing Wright & Miller, Federal Practice & Procedure, §1029 (1969):

> The rules will remain a workable system only as long as trial court judges exercise their discretion intelligently on a case by case basis; application of arbitrary rules of law to particular situations only will have a debilitating effect on the overall system.

Only by allowing the district court discretion to examine the terms of a purported offer of judgment to decide if the cost shifting provisions of Rule 68 are applicable, can the ends of justice be furthered.

C. Decisions of State Courts Allow Review of Offers of Judgments

As noted by petitioner, several states have rules similar to the federal offer of judgment rule. Contrary to Delta's assertion, however, that these rules are applied strictly and literally, several courts have arrived at the same result as the District Court and Court of Appeals in the instant case. Those cou ts examined the terms of the offer to determine the applicability of an offer of judgment rule.

In Colby v. Larson, 297 P.2d 1073 (Ore. 1956), the Supreme Court of Oregon had the opportunity to consider the effectiveness of a defendant's offer of judgment where the defendant tendered to the clerk of the court the exact amount sought by plaintiff, $372.59. Both parties sought costs against the other, defendant on the basis of the Oregon offer of judgment statute,[6] and plaintiff on the basis of the Oregon statute governing claims less than $500.[7] The court recognized the

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[6] The defendant may, at any time before trial, serve upon the plaintiff an offer to allow judgment or decree to be given against him for the sum, or the property, or to effect therein specified. . . . If the offer is not accepted. . .and if the plaintiff fails to obtain a more favorable judgment or decree, he shall not recover costs, but the defendant shall recover of him costs and disbursements from the time of the service of the offer. ORS 17.055.

[7] Plaintiff sought recovery of costs and attorneys' fees pursuant to ORS 20.080, which provided:

> In any action for damages for an injury or wrong to the person or property, or both, of another where the amount recovered is $500 or less, there shall be taxed and allowed to the plaintiff as part of the costs of the action, a reasonable amount to be fixed by the court as attorneys' fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant not less than ten days before the commencement of the action; provided, that no attorneys' fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount not less than the damages awarded to the plaintiff.

conflict between the two sections. If the plaintiff made a written demand upon the defendant more than ten days before the commencement of the action and the defendant did not tender an amount equal to the demand prior to the commencement of the action, plaintiff was entitled to costs, including attorneys' fees. On the other hand, if the defendant offered to allow judgment to be taken against him for the sum demanded by the plaintiff after the commencement of the action but before trial, the defendant was entitled to costs.

The court held that, assuming that a proper demand was made by plaintiff, if it adopted the defendant's position, the legislative purpose of ORS 20.080 would be defeated. A defendant could ignore the plaintiff's demand before commencement of the action, later, make an offer of judgment in the amount demanded, and

> [Be] secure in the knowledge that if action should be brought he could escape payment of an attorney's fee and other costs by offering before trial to allow judgment to be given against him as provided in ORS 17.055. 297 P.2d at 1975.

Rejecting the defendant's construction, the Oregon Supreme Court ruled that this was a clear case for application of the rule that where there is a conflict between two statutes, both of which would otherwise have full force and effect, and the provisions of one are particular, special and specific, and those of the other are general, the specific provision must prevail over the general provision 297 P.2d at 1075.

The Court also looked to the general purposes underlying the two statutory provisions. The Oregon offer of judgment statute was a general statute, applicable to every kind of case at law or in equity and had been a part of the Oregon law since 1862. On the other hand, ORS 20.080 was a special statute passed in 1947, to address a particular situation. It applied only to tort actions involving

injury in the amount of $500 or less, and was undoubtedly enacted to encourage settlement without litigation of meritorious claims involving small sums.

> Frequently the injured person might forego action upon a small claim because he realized that, after paying his attorney, his net recovery would not be worth the time and trouble of a vexatious lawsuit. The legislature may have found that tortfeasors or their insurance carriers frequently rejected meritorious claims of this kind because of this known reluctance of injured persons to litigate. Claims which in honesty and fairness should have been paid were not paid, and it was to remedy this evil that the statute was passed. 297 P.2d at 1075.

Colby v. Larson, supra, is analogous to the instant case. Title VII, like ORS 20.080 was enacted for a specific purpose. The Colby Court refused to allow plaintiffs to carry the burden of litigation by the use of the offer of judgment statute. Nor would the Court allow the earlier, general statute to override the specific, later policies enunciated by the legislature. This same rationale is applicable

in the instant case. Defendants should not be allowed to use the earlier, more general provisions of Rule 68 to ride roughshod over later express Congressional intent.

In addition, several courts have allowed the trier of fact to examine the facts surrounding the offer to determine its reasonableness. In Vroman v. Kempke, 34 Wis. 2d 680, 150 N.W. 2d 423 (Wis. 1967), the Supreme Court of Wisconsin had the opportunity to examine an offer of judgment as to its reasonableness at the time it was made. The Wisconsin statute in effect at the time, §269.02, Stats., provided that "(1) after issue is joined but before trial the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against him. . ." Thereafter, if the offer is rejected and the plaintiff fails to recover a more favorable judgment, defendant shall recover costs.

In this personal injury action, the defendant made an offer of judgment shortly before selection of the jury on the day of trial. The judgment secured by plaintiffs at trial was less than the amount offered by defendant. Following the trial, defendant moved for costs. The trial court held that the offer of judgment was not timely made. The Supreme Court of Wisconsin agreed with the trial court, again, rejecting defendant's mechanical application of the offer of judgment rule. The Court acknowledged that the defendants had made their offer of judgment before the commencement of trial, in compliance with the terms of §269.02. The Court ruled, however, that the section required a defendant who sought its benefits to make his offer at a reasonable time before trial, not the last minute before trial.

Nor is it an uncommon practice to allow the trial court discretion to determine if the offer of judgment is, in fact, more favorable than the judgment finally obtained. In

Bertilacci v. Avery, 42 Mich. App. 483, 202 N.W.2d 331 (1972), the court used an equitable formula to determine if, and in fact, the offer of judgment was more favorable than the judgment finally obtained.[8] The offer of judgment in that case was for $3,000, plus $500 as costs and attorneys' fees. The judgment finally obtained by the plaintiff was in the amount of $3,000 plus costs and interest. The court ruled that the judgment finally obtained was more favorable than the offer, primarily because of the inclusion of interest.

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[8] The Michigan statute in effect at the time was GCR 1963, 519.1:

> If the judgment finally obtained by the offeree is not more favorable than the rejected offer, the offeree must pay the taxable costs incurred after the making of the offer. [Emphasis added.]

Similarly, in Herring-Hall-Marvin Safe Co. v. Balliet, 44 Nev. 94, 190 P. 76 (1920), the Supreme Court of Nevada ruled that whether or not a judgment is "more favorable" in a particular case within the meaning of the statute is a question to be determined by the trial court.

> We are of the opinion that the term "more favorable" must be construed with reference to the facts and circumstances of each particular case. While we do not go to the extent of holding that this court is without the power or authority to correct the abuse of the power conferred by this statute, we do hold that whether or not a judgment is "more favorable" in the particular case must be left to the sound discretion of the district court. 190 P. at 77.

See also Howard v. Farley, 29 How. Prac. 4 (1865) (the amount of judgment is not the only test of whether a judgment is more favorable than an offer).

State courts with similar offer of judgment statutes have also considered the comprehensiveness or validity of an offer of judgment. In Johnson v. Chapman, 223 N.Y.S. 515 (1927), and in Public Bank of New York

New York courts held that an offer of judgment which did not include interest up to the time of the offer of judgment was insufficient to operate as a valid offer of judgment. In fact, the Nevada Supreme Court, in Leeming v. Leeming, 87 Nev. 530 490 P.2d 342 (1971), refused to apply Nevada's offer of judgment statute at all to a divorce proceeding, holding that divorce cases were not the kind of action to which this rule should apply.

Other courts have required that an offer must be fair and reasonable. Benda v. Fana, 10 Ohio St. 2d 259, 227 N.E.2d 197 (Ohio 1967) (the purpose of offer of judgment statute is termination of litigation where defendant tenders to plaintiff a fair offer). In other cases, the courts simply refused to award costs to either party. Insurance Company of North America v. Twitty, 319 So.2d 141 (Fla. App. 1975); Schnute Hoffman Co. v. Sweeney, 136 Ky. 773, 125 S.W. 180 (Ky. App. 1910).

Thus, it is hardly a novel or uncommon phenomenon for courts to review offers of judgment before blindly awarding costs to defendants who made more favorable offers than the judgments finally obtained. Rather, it is the duty of courts to assess all factors, legal and factual, and arrive at a just determination of the conflict between the parties. This duty was fulfilled by the courts below.

D. The Decision of the Court of Appeals Promoted the Purpose of Rule 68

Petitioner raises the in terrorem argument that the decisions of the courts below will deprive defendants of the possibility of any pretrial resolution in Title VII actions. (Pet. Brief, p. 16) This would suggest that offers of judgment are frequently used by defendants in discrimination cases to terminate litigation. This contention is belied by the paucity of case law interpreting Rule 68 and Title VII. The fact is, that Rule 68 has been used only infrequently, especially in employment discrimination cases. Acceptance of petitioner's position, however, would result in a substantial increase in the use of offers of judgment, particularly nominal offers which every defense counsel will make.

In any event, the Lawyers' Committee does not suggest, nor did the Court of Appeals decide, that Rule 68 would be inapplicable in Title VII cases. Rather, the Court of Appeals decided, and the Lawyers' Committee concurs, that the District Court should exercise its discretion and review the terms of the offer of judgment to determine if in fact, it is a fair and effective offer of judgment. The Lawyers' Committee is not asking this Court to relieve any plaintiff of the "known consequence of his or her own conduct." (Pet. Brief, p. 16) The Lawyers' Committee is asking this Court to relieve plaintiffs of the burden of liability for defendants' costs when bad faith offers of judgment are used as "cheap insurance." It does not logically follow that because the District Court awarded

judgment to defendant in the instant case that respondent August was a "obdurate" plaintiff. Where such a plaintiff is encountered, however, and an action is vexatious or meritless, a nominal offer of judgment and an award of costs to defendants may be entirely proper, just as an award of attorneys' fees pursuant to the Court's decision in Christianburg Garment Co. v. EEOC, supra, may also be proper.

Finally, petitioner's suggestion that the policies underlying Title VII will not be undercut because Rule 68 does not effect the initiation of litigation is patently absurd. (Pet. Brief, p. 18) Title VII was not meant to increase the number of cases in court, but to encourage private redress of civil rights violations. Title VII was not designed to encourage institution of meritless suits. The outcome of litigation is unpredictable even for those with meritorious claims. By punishing those plaintiffs who reject insufficient offers of judgment, regardless of the relative merits of the claim, the national goal of eliminating civil rights violations will never be attained.

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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